United States Court of Appeals

for the Second Circuit

APPENDIX

75-2042

United States Court of Appeals

For the Second Circuit.

STANLEY ROTHSCHILD,
Plaintiff-Appellant,

STATE OF NEW YORK, COMMISSIONER OF CORRECTIONAL SERVICES, HONORABLE GEORGE ROBERTS, Acting Justice of the Supreme Court of the State of New York, New York County,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX.

VICTOR J. HERWITZ,
Attorney for Plaintiff-Appellant,
22 East 40th Street,
New York, N. Y. 10016

LOUIS J. LEFKOWITZ,
Attorney General of the State of New York, Attorney for Defendants-Appellees,
2 World Trade Center,
New York, N. Y. 10047

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1975

(6143)

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INDEX TO APPENDIX.

* The Plaintiff's appendix and briefs in the New York Court of Appeals were incorporated by reference in the petition for the Writ of Habeas Corpus and deemed marked "Exhibit C"; relevant portions thereof are quoted in both the petition and in the application for the certificate of probable cause.

DOCKET ENTRIES.

IF CASE WAS | 66-1310 4/26/70 WM | C.D. NUMBER | JS-5 X

75 Civ. 0270 STANLEY ROTHSCHILD VS STATE OF N.Y. ET AL WERKER,J.

DATE	NR.	PROCEEDINGS
01-20-75		Filed petition for writ of habeas corpus.
01-22-75		Filed petitioners Order to show cause why an order should not be made releasing petitioner from custody - service by 1-22-74 - ret. 1-24-75 -- Werker, J.
01-24-75		Hearing held on O.S.C. - Decision reserved. -- Werker, J.
02-11-75		Filed MEMORANDUM-DECISION #41864....For all the reasons stated herein, the petition for a writ of habeas corpus is denied. So ordered. - Werker, J. m.n
02-11-75		Filed endorsement on petition for a W/H/C: See memorandum decision dated 2-10-75. Petition denied. So ordered. - Werker, J.
03-07-75		Filed pltf's affdvt. and notice of motion for certificate of Probable Cause
03-07-75		Filed pltfs. notice of appeal to the USCA from the decision and order denying and dismissing the petition for w/h/c on Feb.10,1975. (copies mailed)
03-14-75		Filed memo end. on pltfs. motion for certificate of probable cause-- Certificate of probable cause granted. So ordered,Werker,J. m/n
03-14-75		Filed pltfs. certificate of probable cause. Werker,J. m/n

DOCKET ENTRIES

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PLAINTIFFS

ROTHSCHILD,STANLEY

DEFENDANTS WERKER,J.

STATE OF NEWYORK ,ET AL
COMMISSIONER OF CORRECTIONAL SERVICES
HON. GEORGE ROBERTS, Acting Justice of the Supreme Court of the State of New York,New York County

CAUSE

28 USC 2241(a)(3)(d),petition for writ of habeas corpus

s1a

ATTORNEYS

Victor J. Herwitz
22 East 40th St.
NYC 10016 LE-2-9470

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NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

- -x

STANLEY ROTHSCHILD,	:	
-against-	:	Action Number
STATE OF NEW YORK, COMMISSIONER OF CORRECTIONAL SERVICES, HONORABLE GEORGE ROBERTS, Acting Justice of the Supreme Court of the State of New York, New York County.	:	75 Civ. 270 (HFW)

- -x

NOTICE OF APPEAL

TO

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Notice is hereby given that STANLEY ROTHSCHILD above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the *decision and order of the U.S.D.C. - S.D.N.Y. (WERKER, D. J.) denying and dismissing the petition for writ of habeas corpus on February 10, 1975.

March 6, 1975.

Signed Victor Flamm

By:

Notice to:
Hon. Louis J. Lefkowitz
Attorney General
State of New York
2 World Trade Center
New York, New York 10047

COPY

DECISION AND ORDER APPEALED FROM (WERKER, D. J.).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -x

STANLEY ROTHSCHILD,

Plaintiff,

- against -

STATE OF NEW YORK, COMMISSIONER OF CORRECTIONAL SERVICES, HONORABLE GEORGE ROBERTS, Acting Justice of the Supreme Court of the State of New York, New York County,

Defendants.

MEMORANDUM DECISION

75 Civ. 270 (HFW)

- - - - - - - - - - - - - - - - - -x

APPEARANCES:

VICTOR J. HERWITZ
22 East 40th Street
New York, New York 10016
Attorney for Plaintiff

LOUIS J. LEFKOWITZ
Attorney General
2 World Trade Center
New York, New York
Attorney for Defendants

By: Jonathan Lovett
Assistant District Attorney
Of Counsel

HENRY F. WERKER, D. J.

The petitioner is a former New York City policeman convicted in New York Supreme Court of grand larceny in the first degree[1] and attempted grand larceny, both by extortion.[2] His conviction was unanimously affirmed by both the Appellate Division of that court[3] and by the New York Court of Appeals.[4] The gravamen of the petition for writ of habeas corpus is that

the trial court committed errors of constitutional proportions in permitting the prosecutor to bring out on Rothschild's cross-examination his "good intentions" in doing the acts alleged to constitute attempted grand larceny and then impeach that testimony by bringing out his failure to explain those intentions upon or after arrest. Specifically Rothschild points to the trial court's refusal to permit him to testify on direct that his intention had been merely to arrest the complainant for bribery,[5] and argues that (1) using evidence of post-arrest silence at trial, even for purposes of impeachment alone, violates the defendant's fifth amendment right to remain silent; (2) Rothschild's post-arrest silence is not inconsistent with his trial testimony and therefore can not be used to impeach; and (3) the district attorney in any case can not cross-examine as to areas not covered by direct testimony in order to lay a foundation for impeachment.

Although this court is in agreement with petitioner's arguments, as discussed below, it denies the petition for writ of habeas corpus because the record reveals overwhelming evidence of Rothschild's guilt; any errors committed by the trial court were "harmless beyond a reasonable doubt." Chapman v. California, 386 U. S. 18, 24 (1967); cf. United States v. McCarthy, 473 F.2d 300, 304-05 (2d Cir. 1972). In Chapman the Supreme Court stated:

> We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as

DECISION AND ORDER APPEALED FROM (WERKER, D. J.)

> petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless-error statutes or rules, ... All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.

Id. at 21 - 22. In this case the court is convinced that the jury would have chosen to convict the petitioner even if Rothschild had been permitted to testify on direct as to his intentions, and the district attorney had been precluded from cross-examination as to post-arrest silence.

The New York Court of Appeals summarized the evidence against Rothschild as follows:

> On October 21, 1969, defendant and other Narcotic Division officers, armed with a search warrant, entered the apartment of Geraldine Williams, the common law wife of William Mathis, Jr. They threatened to send her to jail on a trumped up charge and to deprive her of her children unless she called her "father-in-law," William Mathis, Sr. [Mathis] to make arrangements to have him come to the apartment immediately. Frightened, she complied, and upon Mathis' arrival, defendant demanded $6,000 from him, threatening to send Miss Williams to jail if he did not comply. Mathis left and, after a short while, returned and paid the money, whereupon defendant and his companions departed.
>
> Thereafter, and on December 6, the defendant again sought out Mathis, this time on the pretext that he wanted to locate Mathis' son . . . whom he wanted to interrogate regarding a narcotics investigation. The defendant then advised Mathis that he could "[smooth] things over"

for $12,000 and, of course, he would not then need to locate the son. Mathis protested that he had no money but agreed to meet with the defendant at a later date. Mathis then went to police headquarters where he related all these events to the officers in command. Following their instructions, he met with the defendant and agreed to pay the money in installments, the first to be made on December 11. On that date, the police gave Mathis $280 in marked bills, wired his establishment with recording devices and several officers secreted themselves on the premises. Upon defendant's arrival, Mathis engaged him in conversation* culminating in defendant agreeing to accept the money in installments. When Mathis handed defendant the marked money, the officers entered the room, revealed their identity and arrested him.

---

* The recorded conversation referred to the October 21 extortion and defendant expressed no surprise when Mathis complained that "6,000 in two months . . . two months ago, and now twelve . . . where the hell am I going to get that kind of money.". . . [D]efendant inquired "(h)ow much will you pay me?" and after Mathis replied $300 now and $500 per week, defendant acceded. Defendant does not dispute the accuracy of the recording. He complains only that it was of poor quality and that his statements were taken out of context.

This evidence was presented through the testimony of Mathis, Mathis Jr., Geraldine Williams and the arresting officers, and was in large measure confirmed by the tape recording of the December 11th conversation. The only defense presented as to the attempted grand larceny charge was that of "good intentions," i.e., that he had been approached by Mathis and had agreed to accept the money offered only in order to arrest him for bribery.

DECISION AND ORDER APPEALED FROM (WERKER, D. J.)

Had there been less than overwhelming evidence of guilt, this court would be inclined to grant petitioner a writ of habeas corpus. Relevant case law in both the federal and state courts clearly provides that where a defendant's intent is in issue he should be permitted on direct examination to testify as to that intent. Crawford v. United States, 212 U.S. 183, 202-03 (1908); United States v. Kyle, 257 F.2d 559, 563 (2d Cir. 1958); People v. Levan, 295 N. Y. 26, 33-34 (1945); People v. Stewart, 37 A.D.2d 908, 325 N.Y.S.2d 533 (4th Dept. 1971). See also United States v. Hayes, 477 F.2d 868, 873 (10th Cir. 1973) and cases cited therein. In this case the defendant was precluded from doing so in any but the most indirect manner (see note 5, supra). At each attempt the trial court sustained objections to such testimony as hearsay.[6]

In Harris v. New York, the Supreme Court confirmed with respect to illegally obtained statements what has long been hornbook law in New York, that evidence not admissible on the prosecution's direct case may be used on cross-examination to impeach the defendant's credibility as a witness. This can occur, however, only when the defendant has opened the door by testifying to the matter on direct examination. People v. Rahming, 26 N.Y.2d 411, 418, 311 N.Y.S.2d 292, 298 (1970); People v. Harris, 25 N.Y.2d 175, 177, 303 N.Y.S.2d 71, 72 (1969), aff'd, 401 U.S. 222 (1971); People v. Miles, 23 N.Y.2d 527, 542-45, 297 N.Y.S.2d 913, 924-26 (1969). The purpose of allowing such impeachment use of inadmissible evidence is to

prevent the defendant from "affirmatively resort[ing] to perjurious testimony in reliance on the Government's disability to challenge his credibility." Walder v. United States, 347 U.S. 62, 65 (1954). Accord Harris v. New York, supra at 226.

In the Rothschild trial, although defendant did testify as to his intention, he did so not on direct, but on cross-examination at the prosecutor's behest. This is a different situation than that found in Harris v. New York, where the prosecution "did no more than utilize the traditional truth-testing devices of the adversary process." 401 U.S. at 225. To allow the district attorney to impeach testimony which he himself had elicited for the first time in the same cross-examination is to allow the state to build a case against the defendant's credibility by bootstrapping. This is clearly not permissible. See Agnello v. United States, 269 U.S. 20, 35 (1925); People v. Rahming, supra; People v. Schwartz, 30 A.D. 385, 292 N.Y.S.2d 518, 522 (1968).

The petitioner also urges that although impeachment use of prior inconsistent statements has been upheld by the Supreme Court, such use of post-arrest silence in this case was not constitutionally correct because Rothschild's silence is not in any way inconsistent with his later statements at trial. The New York Court of Appeals rejected this argument:

> Here we are presented only with the question of whether non-utterances, or silence, may be used against the defendant on cross-examination, when such silence is patently inconsistent with the defense asserted, and there is a patent obligation

DECISION AND ORDER APPEALED FROM (WERKER, D. J.)

> to speak. * * * The natural consequences of his status as a law enforcement officer would require him to promptly report any bribe or attempted bribe to his superiors, and certainly protest and reveal such an alleged scheme after his arrest to them, and to his fellow officers as well.

The court appears to have based its conclusion that Rothschild was under a "patent obligation to speak" on the fact that he was a policeman. While he may indeed have had such an obligation prior to his arrest, this court fails to understand how he could have remained under that obligation after his arrest, when he was immediately suspended from the force and placed in a classic custodial position vis-a-vis his former colleagues.[7] Having served as a police officer he surely knew his Miranda[8] warnings, and like any other suspect in police custody, he was entitled to rely on his privilege not to discuss the alleged violations with his captors. Miranda v. Arizona, 384 U.S. 436 (1966). Since he was relieved of police duties and obligations upon his arrest and immediate suspension, his silence at that time does not appear to this court patently inconsistent with the defense asserted at trial. Petitioner argues in any case that whether inconsistent or not, post arrest silence can not be used to impeach.

Whether, in light of Harris v. New York, supra, silence at the time of arrest can be used as a prior inconsistent "statement" or "act" to impeach exculpatory trial testimony is a question as yet undecided in this circuit.[9] In pre-Harris cases, however, the Court of Appeals has found cross-examination

along such lines to be "clearly violat[ive of] the defendant's Fifth Amendment right to remain silent." United States v. Semensohn, 421 F.2d 1206, 1210 (2d Cir. 1970). In that case the defendant was convicted of knowingly and wilfully informing his local draft board that he was in a Reserve Unit when in fact he was not. In an effort to shake his testimony on direct that he had actually believed himself a member of a Reserve Unit, the Assistant United States Attorney cross-examined Semensohn as to whether he had told the FBI on arrest of that belief. The Court of Appeals found an "unconstitutional inference in the questions and their answers":[10]

> As we stated in United States v. Mullings, 364 F.2d 173, 175 (2d Cir. 1966), when we were considering the admissibility of testimony relative to a defendant's failure to make exculpatory statements while under arrest:
>
> [The defendant] was under no duty to say anything and his failure to speak should not have been considered against him. Having been placed under arrest he had the right to remain silent. It is well settled that an inference of guilt may not be drawn from a failure to speak or to explain when a person has been arrested.

421 F.2d at 1209-10. See also United States ex rel. Young v. Follette, 308 F. Supp. 670, 672 n.2 (S.D.N.Y. 1970).

Rulings in other circuits have varied,[11] and the Supreme Court has agreed to consider the issue on review of the decision in United States v. Hale, 498 F.2d 1038 (D.C. Cir. 1974). In that case the Court of Appeals for the District of Columbia found no inconsistency between a defendant's

exercise of a constitutional right to remain silent and his subsequent exculpatory testimony at trial, distinguishing Harris v. New York on the ground that Harris "did not exercise his constitutional right to remain silent, but rather spoke, albeit without first being advised of his right":[12]

> The Supreme Court has proscribed comment by a court or prosecutor on the fact that a defendant did not testify at trial on the ground that such comment "cuts down on the privilege by making its assertion costly." Griffin v. California, . . . The Court, relying upon this analysis, then ruled in Miranda that it is "impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation." The rationale for this rule was articulated by Justice Black in his Grunewald concurrence:
>
> > [There are] no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value or constitutional privilege is largely betrayed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution. 353 U.S. at 425-26.
>
> Nothing in Harris undercuts this fundamental constitutional principle since Harris did not involve assertion of the constitutional right.

This court finds the Hale rationale persuasive particularly in this case where, as noted before, the defendant did not directly testify to the matter on which he was impeached. Even this combination of errors, however, cannot outweigh the record's overwhelming evidence against petitioner. That

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evidence mandates the conclusion that the errors cited were harmless beyond a reasonable doubt. The petition for a writ of habeas corpus is consequently denied.

SO ORDERED.

Dated: New York, New York

February 10, 1975

Henry F. Werker

U. S. D. J.

DECISION AND ORDER APPEALED FROM (WERKER, D. J.)
STANLEY ROTHSCHILD v. STATE OF NEW YORK, et al., 75 Civ. 1270

NOTES

1. Section 155.05 of the New York Penal Code defines larceny as follows:

> 1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.
> 2. Larceny includes a wrongful taking, . . ., with the intent prescribed in subdivision one of this section, committed in any of the following ways:
>
> * * *
>
> (a) By extortion.
>
> * * *.

Section 155.40 states in pertinent part:

> A person is guilty of grand larceny in the first degree when he steals property and when the property, regardless of its nature and value, is obtained by extortion committed by instilling in the victim a fear that the actor or another person will . . . (c) use or abuse his position as a public servant by engaging in conduct within or related to his official duties, . . ., in such manner as to affect some person adversely.

2. May 31, 1972, New York County.

3. May 24, 1973, without opinion.

4. November 27, 1974 (Opinion No. 487).

5. When the defendant's attorney attempted to elicit the reasons defendant acted as he did, the court stated:

> I don't think reasons are proper questions. The point is he went there and from what he tells us the conversation was will [sic] gather his reasons. That is the way it is supposed to be done. He doesn't have to give us his thinking.

Tr. 452. Later, on the record but out of the jury's hearing, the following colloquy took place:

> Mr. Herwitz: * * * I respectfully submit that the operation of his mind, and his reasons for doing what he had [sic]

DECISION AND ORDER APPEALED FROM (WERKER, D. J.)

are relevant, and admissible. This generally is the area of proof that I wish to develop.

Mr. Gershman: I object to any after-the-fact testimony as to what his mental state was 28 months ago. It is clearly inadmissible as hearsay. For those reasons I object to it.

The Court: * * * I do sustain Mr. Gershman's objection to his using his reasoning processes to tell what his intention was.

In other words, the jury can infer a man's intention from the acts that he does. I have no objection nor would I sustain an objection to any questions that you ask with reference to his acts as bringing out his intentions, but I certainly think it's improper for you to say to him, what was your reason for saying $12,000, or how did you happen to say $12,000, what did you mean by saying it?

Tr. 462-463.

6. This court fails to understand how relevant testimony by the defendant as to his own intent could be hearsay. Even if such testimony contained reference to statements of others it would surely fall within the state-of-mind-in-issue exception to the hearsay rule. See Matter of Bergstein v. Board of Education, 34 N.Y.2d 318, 324 (1974).

7. "Proper discipline of the police force demands a power of immediate suspension even before specific charges are formulated and served." Brenner v. City of New York, 9 A.D.2d 729, 192 N.Y.S.2d 449 (1st Dept. 1959).

8. The Court of Appeals has previously held that suspension of a New York City policeman "implies that the official is relieved of duty during the interval," and does not continue to perform his services on the force. Brenner v. City of New York, 9 N.Y.2d 447, 214 N.Y.S.2d 444, 446 (1961). See also Gould v. Looney, 304 N.Y.S.2d 537, 542 (S. Ct. Nassau 1969). If a policeman on suspension is relieved of all police duties is he not also relieved of police "obligations?"

9. The question was recently raised on appeal in United States v. Cecil Grafton Rose, 500 F.2d 12, 17 (2d Cir. 1974); however, the court determined that "[s]ince Rose's counsel failed to object to the examination during the trial, we need not

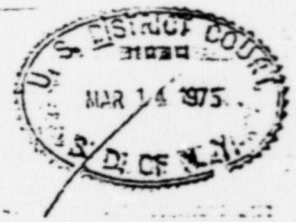
reach the merits of whether the government may show the defendant was silent upon arrest because that is inconsistent with the defendant's trial testimony."

10. 421 F.2d at 1210.

11. United States v. Ramirez, 441 F.2d 950, 954 (5th Cir.) cert. denied, 404 U.S. 869, reh. denied, 404 U.S. 987 (1971) (constitutionally permissible: "the cross-examination falls clearly within the ambit of Harris v. New York."); United States ex rel. Burt v. New Jersey, 475 F.2d 234, 236-38 (3d Cir. 1973) (permissible); Johnson v. Patterson, 475 F.2d 1066, 1068 (10th Cir.), cert. denied, 414 U.S. 878 (1973) (impermissible: "silence at the time of arrest is not an inconsistent or contradictory statement . . . is simply the exercise of a constitutional right that all persons must enjoy with qualification."); Agnellino v. State of New Jersey, 493 F.2d 714, 719-25 (3d Cir. 1974) (permissible) United States v. Hale, 498 F.2d 1038, 1042 (D.C. Cir. 1974) (impermissible), cert. granted, 43 U.S.L.W. 3325.

12. 498 F.2d at 1043.

CERTIFICATE OF PROBABLE CAUSE TO APPEAL
(WERKER, D. J.).



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

STANLEY ROTHSCHILD,

Plaintiff,

-against-

STATE OF NEW YORK,
COMMISSIONER OF CORRECTIONAL SERVICES,
HONORABLE GEORGE ROBERTS,
Acting Justice of the Supreme Court of the State of New York,
New York County,

Defendants.

- -X

CERTIFICATE OF PROBABLE CAUSE

75 Civ. 270 (HFW)

I, HENRY F. WERKER, Judge of the United States District Court for the Southern District of New York, certify that I have examined the Motion and Affidavit for issuance of a Certificate of Probable Cause together with the application for a writ of habeas corpus in the United States District Court for the Southern District of New York, together with the record of proceedings therein and find that probable cause exists for the appeal taken in the above-named cause to the United States Court of Appeals for the Second Circuit from the order of the district court denying petitioner's application for a writ of habeas corpus.

DATED: March 10, 1975

Henry F. Werker
HENRY F. WERKER, D.J.

OPINION OF NEW YORK COURT OF APPEALS.

OPINION OF THE COURT OF APPEALS
Decided November 21, 1974

People v. Rothschild,
35 N.Y.2d 355

Taken from the Official Reports

GABRIELLI, J. The novel and primary question on this appeal concerns the propriety of inquiring of the defendant police officer upon cross-examination whether, either prior or after his arrest, he had revealed to his superiors or anyone that, as claimed by the defendant, the complaining witness was attempting to bribe him. We hold that this inquiry was proper.

The defendant stands convicted of grand larceny, first degree and attempted grand larceny, both by extortion (Penal Law, §§ 155.40, 110.00)[1] and the convictions have been affirmed (41 A D 2d 1028).

On October 21, 1969, defendant and other Narcotics Division officers, armed with a search warrant, entered the apartment of Geraldine Williams, the common-law wife of William Mathis, Jr. They threatened to send her to jail on a trumped up charge and to deprive her of her children unless she called her " father-

1. Penal Law (§ 155.40) in pertinent part provides that: " A person is guilty of grand larceny in the first degree when he steals property and when the property, regardless of its nature and value, is obtained by extortion committed by instilling in the victim a fear that the actor or another person will • • • (c) use or abuse his position as a public servant by engaging in conduct within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely."

Penal Law (§ 110.00) provides that: " A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime."

in-law", William Mathis, Sr. (Mathis) to make arrangements to have him come to the apartment immediately. Frightened, she complied and upon Mathis' arrival, defendant demanded $6,000 from him, threatening to send Miss Williams to jail if he did not comply. Mathis left and, after a short while, returned and paid the money, whereupon defendant and his companions departed.

Thereafter, and on December 6, the defendant again sought out Mathis, this time on the pretext that he wanted to locate Mathis' son who had been eluding him and whom he wanted to interrogate regarding a narcotics investigation. The defendant then advised Mathis that he could "[smooth] this thing over" for $12,000 and, of course, he would not then need to locate the son. Mathis protested that he had no money but agreed to meet with the defendant at a later date. Mathis then went to police headquarters where he related all these events to the officers in command. Following their instructions, he met with the defendant and agreed to pay the money in installments, the first to be made on December 11. On that date, the police gave Mathis $280 in marked bills, wired his establishment with recording devices and several officers secreted themselves on the premises. Upon defendant's arrival, Mathis engaged him in conversation[2] culminating in defendant agreeing to accept the money in installments. When Mathis handed defendant the marked money, the officers entered the room, revealed their identity and arrested him.

The evidence presented by the prosecution was adduced from Mathis, his son, Geraldine Williams and the arresting officers, much of which was confirmed by the recorded conversations. We hold the evidence was sufficient for the jury to find both a completed larceny by extortion on October 21 and an attempted larceny on December 11; and, further, for them to refuse to

2. The recorded conversation referred to the October 21 extortion and defendant expressed no surprise when Mathis complained that "6,000 in two months • • • two months ago, and now twelve • • • Where the hell am I going to get that kind of money." To expedite matters, defendant inquired "[H]ow much will you pay me?" and after Mathis replied $300 now and $500 per week, defendant acceded. Defendant does not dispute the accuracy of the recording. He complains only that it was of poor quality and that his statements were taken out of context.

lend credulity to defendant's assertions that he was being corrupted and that he agreed to accept money from him in order to later arrest him for bribery. In short, the record reveals overwhelming evidence of the defendant's guilt.

Pursuing an attempt to impeach the defendant's explanation, the prosecutor, by two questions and without objection, asked him whether at any time prior to going to Mathis' restaurant to receive the bribe and arrest him, he had informed any superior officer of the alleged bribe offer made, as defendant claims, by Mathis. The defendant answered in the negative. He answered similarly when he was then asked whether he had told any of his superior officers or anyone, after his arrest, that he was attempting to get Mathis on a charge of bribery. An objection to this latter inquiry was properly overruled.

The prosecutor did not further pursue the defendant's post-arrest silence on cross-examination. Neither did he pursue it in summation, nor did the court comment upon it when marshaling the evidence in his charge.

While it may not require articulation, we would point out that at least since *People* v. *Rutigliano* (261 N. Y. 103), the rule has been clearly defined to be that the silence of a defendant, after arrest, cannot be used against him (*People* v. *Al-Kanani*, 26 N Y 2d 473, 478; *People* v. *Christman*, 23 N Y 2d 429; *People* v. *Robinson*, 13 N Y 2d 296; *People* v. *Allen*, 300 N. Y. 222; *People* v. *Mleczko*, 298 N. Y. 153; see Richardson, Evidence, [10th ed.], § 222, p. 198). In these cases, and those cited therein, the evidence was held to be erroneously admitted on the prosecution's *direct* case. *Miranda* v. *Arizona* (384 U. S. 436) confirmed the constitutional validity of this rule saying that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." (384 U. S., at p. 468, n. 37.) But, the scope of *Miranda* was modified by *Harris* v. *New York* (401 U. S. 222) where Chief Justice BURGER, writing for the majority, stated that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."

Defendant, in his reliance on *Miranda* v. *Arizona* (*supra*) and its progeny, seeks to use the broad rule there laid down as a sword with which he would stifle a highly probative and proper interrogation. In contradistinction, the purpose of the rule there laid down and in *People* v. *Rutigliano* (*supra*) is actually to afford a shield as a guard against a direct prosecutorial attack utilizing admissions obtained when one is not under a duty to speak. In the instant case, of course, the inquiry occurred on cross-examination after the defendant had testified that in fact he was "setting up" Mathis preparatory to leveling a charge of bribery.

Here we are presented only with the question of whether nonutterances, or silence, may be used against the defendant on cross-examination, when such silence is patently inconsistent with the defense asserted, and there is a patent obligation to speak. We also note with interest other holdings which have approved inquiry upon cross-examination relating to a defendant's silence before and after his arrest, wherein somewhat similar inconsistencies were present, as bearing on his credibility (*United States ex rel. Burt* v. *State of New Jersey*, 475 F. 2d 234; *Agnellino* v. *State of New Jersey*, 493 F. 2d 714).

We conclude that in the posture of this case the defendant's silence may be the proper subject of cross-examination.[3] The defendant's testimony relating to the critical events was diametrically inconsistent with that produced by the prosecution thus creating the question of his credibility to be the central factual issue in the case. The natural consequences of his

3. A survey of cases in other jurisdictions reveals varying holdings. (Compare *Agnellino* v. *State of New Jersey*, 493 F. 2d 714; *United States ex rel. Burt* v. *State of New Jersey*, 475 F. 2d 234, cert. den. 414 U. S. 938 [DOUGLAS, BRENNAN and MARSHALL, JJ., dissenting in opinion]; *United States* v. *Ramirez*, 441 F. 2d 950, cert. den. 404 U. S. 869; *Martin* v. *United States*, 400 F. 2d 149, cert. den. 393 U. S. 987, where it was held that silence after arrest is a proper subject for cross-examination; with *Johnson* v. *Patterson*, 475 F. 2d 1066, cert. den. 414 U. S. 878; *Fowle* v. *United States*, 410 F. 2d 48; cf. *Deats* v. *Rodrigues*, 477 F. 2d 1023; *Gillison* v. *United States*, 399 F. 2d 586, where it was held that silence after arrest could not be subjected to cross-examination; and with *State* v. *Anderson*, 110 Ariz. 238; cf. *Jones* v. *State*, 317 A. 2d 109 [Del.], where it was held that silence after arrest was not a proper subject for cross-examination but, that in face of overwhelming evidence of guilt, it constituted harmless error).

status as a law enforcement officer would require him to promptly report any bribe or attempted bribe to his superiors, and certainly protest and reveal such an alleged scheme after his arrest to them, and to his fellow officers as well.

Defendant's other contentions have been considered and have been found to be insubstantial.

The order of the Appellate Division should be affirmed.

Chief Judge BREITEL and Judges JASEN, JONES, WACHTLER and RABIN concur; Judge STEVENS taking no part.

Order affirmed.

PETITION FOR A WRIT OF HABEAS CORPUS.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

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IN THE MATTER OF THE PETITION OF

STANLEY ROTHSCHILD

FOR A WRIT OF HABEAS CORPUS

Petition for a Writ of Habeas Corpus

75 Civ. 270

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To the Honorable , Judge of the United States District Court for the Southern District of New York

The petition of Stanley Rothschild respectfully represents:

1. That your petitioner, Stanley Rothschild, is a citizen of the United States and a resident of the County of Nassau, State of New York, in the Eastern District of New York.

2. That your petitioner is now actually, unjustly and unlawfully restrained of his liberty under color of the authority of the State of New York and is in imminent danger of being imprisoned and further restrained of his liberty and detained under color of the authority of the State of New York as more fully appears by the facts hereinafter stated:

a. He is presently released on bail in the sum of $1000 which was posted by him on June 1, 1972 pending his appeal from the judgment of the Supreme Court, New York County (Baer, J.) convicting him of the crimes of grand larceny

in the first degree (by extortion) and an attempt to commit that crime and sentencing him thereon to a maximum term of imprisonment of four years on each count, to run concurrently;

b. Petitioner's appeals from said judgment were affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York, First Department on May 24, 1973 (41 A. D. 2d 1028) and also was affirmed by the Court of Appeals of the State of New York on November 27, 1974 with an opinion (copy of which is annexed hereto, made a part hereof, marked Exhibit "A");

c. With the consent of the District Attorney of New York County, Chief Judge Charles D. Breitel of the Court of Appeals of the State of New York permitted the defendant to remain free on bail pending an application to Mr. Justice Thurgood Marshall of the Supreme Court of the United States for a stay pending the filing and determination of an application for a writ of certiorari which said application was denied on January 6, 1975 (copy of the letter of the Clerk of the Supreme Court so notifying petitioner's attorney is annexed hereto, made a part hereof, marked Exhibit "B");

d. Following denial of the stay application by Mr. Justice Marshall petitioner's counsel advised the District Attorney of New York County of that fact and that, in light of

that denial no application for a writ of certiorari would be presented to the Supreme Court of the United States. Thereupon petitioner was notified that he would be required to surrender at 4:30 p.m. on January 20, 1975 in Part 30 of the Supreme Court, New York County, in the Criminal Courts Building, 100 Centre Street in the County and City of New York, in the Southern District.

3. That the sole claim and authority of which the petitioner is and will be restrained of his liberty is the judgment of conviction referred to above in paragraph 2(a) above.

The said judgment and imminent commitment are void and without authority of law and the restraint of petitioner's liberty and his imminently threatened imprisonment is a denial of due process of law under the fifth and fourteenth amendments of the Constitution of the United States as hereinafter shown.

4. The pertinent facts hereinafter set forth are the basis for petitioner's claim on this application, as it was in the State Court, that petitioner's rights under the fifth and fourteenth amendments of the United States Constitution were substantially impaired:

a. At petitioner's trial, which took place in April,

1972, he took the witness stand in his own defense. He sought on his direct examination to testify that his discussions with the complainant about the payment of money had not been for the purpose of extorting money from him but rather it was for the purpose of obtaining evidence which would enable him to arrest the complainant for attempted birbery. The trial court, however, sustained the prosecutor's objection to that testimony on the ground that it was "inadmissible as hearsay" (A-462)*. Thus, this is not a case in which the defendant's exculpatory statement was given by him on his direct examination.

b. On his cross-examination the prosecutor, despite his previous objection as noted above, led the petitioner into testifying that what had been in his mind in his discussions with the complainant was to get evidence which would enable him to arrest him for attempted bribery. (A 546-A 549) The prosecutor then obtained the petitioner's admission that prior to his arrest he had not spoken to any superior officer in the Department about his discussions with the complainant

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*Refers to page number in pet.'s Appendix in Ct. of Appeals; which is submitted herewith, made a part hereof, deemed marked Exhibit "C".

(549-A 550)*. He then asked the questions and obtained the answers which petitioner claims violated his Fifth Amendment rights. (A 550-A 551)

"Q. After you were arrested on December 11th did you tell any superior officers or anybody --

MR. HERWITZ: If your Honor pleases, I object.

THE COURT: Overruled.

Q. That you were an innocent man just trying to get this drug peddler on a charge of bribery, did you ever tell anybody that?

MR. HERWITZ: I object to that question.

THE COURT: Overruled.

Q. Did you ever tell that to anybody?

A. No, sir.

Q. In the last twenty-eight months, did you ever tell anybody in the Police Department ranking police officers, that you have got me all wrong, I was just trying to get this drug peddler and lock him up on a charge of bribery, did you ever tell that to anybody?

MR. HERWITZ: I object.

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* (Contrary to the statement made by Judge Gabrielli in his Opinion, petitioner at no time raised any question concerning the propriety of the prosecutor's asking him on cross-examination whether, prior to his arrest, he had revealed to his superiors, or anyone else, that the complaining witness was attempting to bribe him.)

THE COURT: Overruled.

A. No, sir."

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c. In his summation, the prosecutor devoted a substantial portion of the time allowed him to attacking petitioner's claim that his discussions with the complainant concerning the payment of money by the latter was for the purpose of making a case of attempted bribery.(A 594-A 597) In the course of that argument the prosecutor said this: (A 596-A 597):

> "...Why didn't he tell any of his superior officers about this? I don't think I even have to go into this, for it is so ludicrous. If he was going to make a case against this desperado, isn't he going to tell the District Attorney's office, or his commanding officer. Isn't that just common sense?" [Emphasis supplied]

5. For the reasons stated below the factual and legal basis for the decision of the Court of Appeals of the State of New York as revealed in the Opinion of Judge Gabrielli was erroneous:

a. With respect to Judge Gabrielli's statement that:

> "the natural consequence of (defendant's) status as a law enforcement officer would require him to promptly report any bribe or attempted bribe to his superiors, and certainly protest and reveal such an alleged scheme after his arrest to them, and to his fellow officers as well." [Emphasis added]

PETITION FOR A WRIT OF HABEAS CORPUS

The pertinent facts are these:

1) Petitioner was arrested on December 11, 1969 by Sergeant Maduro of the Narcotics Division of the Police Department. The arrest was made immediately after petitioner had been handed $280 by the complainant. From the time, place and circumstances under which the arrest was made it was immediately obvious to the petitioner (as it would have been to any police officer) that, contrary to petitioner's prior belief, the complainant was not trying to bribe petitioner but he was , acting under the instructions of police investigators, trying to entrap petitioner into accepting a bribe. Under such circumstances the complainant, obviously, would not have been guilty of any crime and petitioner as a law enforcement officer did not then, nor does he now think he was obligated to reveal to any superior officer or to his fellow officers what they obviously already knew.

2) At the time of petitioner's arrest his gun was taken from him and he was immediately taken to the Office of the District Attorney of New York County. At that office he was held incommunicado for several hours during which time he was not questioned by any member of the Police Department nor by any member of the District Attorney's staff (A 514-15).

It was there that he was notified that he was suspended from duty pending trial of charges and his gun and shield were taken from him.

3) The morning after petitioner's arrest he was arraigned on the affidavit of the complainant and was charged with acting in concert with another police officer in demanding and receiving money from the complainant in consideration of his not serving a warrant for the complainant's son.

4) At no time prior to or after petitioner's arraignment was he given the so-called Miranda warnings with which, as a police officer, he was fully familiar. Being familiar with the Miranda warnings petitioner believed at the time of his arrest, and at all times thereafter, that he had the constitutional right to remain silent and was not under any duty because of his law enforcement status to advise his prosecutors, the Police Department of the City of New York, and the District Attorney's Office of New York County, that he had an exculpatory explanation for his conduct. Moreover, from the time of petitioner's arrest he was represented by experienced counsel none of whom at any time suggested to petitioner that he had a duty as a police officer to reveal to law enforcement agencies which were prosecuting him what his defense was to the very serious charges that had been preferred

against him. Nor did petitioner believe, nor was he advised by his counsel that if he failed to disclose to the law enforcement agencies which were prosecuting him what his exculpatory explanation was for his conduct, he would be unable to testify in his own defense without the jury's being advised that he had never previously explained his conduct to the prosecutors, including his superior officers in the Police Department.

5) In light of the facts stated above, petitioner respectfully submits that contrary to what was held by the Court of Appeals petitioner's "silence (was not) patently inconsistent with the defense asserted, and there (was not) a patent obligation to speak."

b. Petitioner submits that the case relied upon by the Court of Appeals, Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L.Ed. 2d 1 (1971), is readily distinguishable on its facts from the case at bar as shall be shown below:

1) In Harris, the Supreme Court held that a defendant could be impeached by "prior inconsistent utterances" made at the time of his arrest even when they were made before the defendant was adequately apprised of his rights. In petitioner's case he made no prior inconsistent utterance at the time of his

arrest, nor at any other time thereafter. Moreover, for the reasons stated above, his silence and his failure to advance his exculpatory explanation for his conduct were not inconsistent with his trial testimony.

2) The premise underlying Harris is that if the defendant voluntarily gives statements to the police that contradict his trial testimony, those statements are admissible because they are obviously relevant for assessing credibility. But where, as here, the defendant is a police officer, familiar with the Miranda warnings and takes them at their face value to the extent of believing that he has the right to remain silent and that such silence cannot be used against him, it is palpably unfair and a violation of the Fifth and Fourteenth Amendments to use that silence against him as was done to petitioner.

c. On the return date of this application petitioner will request leave of the Court fo submit the record and briefs of the parties submitted to the Court of Appeals and will also seek permission to file a separate brief in support of this application.

As has been shown above, petitioner has exhausted his remedies available in the Courts of the State of New York

whose highest Court, the Court of Appeals, on November 27, 1974, affirmed the judgment of the Appellate Division of the Supreme Court of the State of New York, First Department, rendered on May 24, 1973 (41 A. D. 2d 1028) which affirmed the judgment of the Supreme Court, New York County entered on May 31, 1972 convicting the petitioner of the crimes referred to in paragraph 2 (a) above. By reason of the aforesaid judgments and Orders, petitioner has exhausted all of his remedies in the Courts of the State of New York and has no recourse at this time other than by this habeas corpus proceeding. If it is not granted and if no stay is granted pending a hearing then at 4:30 p.m. on January 20, 1975, petitioner will be required to surrender in Part 30 of the Supreme Court, New York County, 100 Centre Street, New York, New York.

Petitioner is 34 years of age, married and the father of two children ages 3 years and 5 months. He lives in his own home with his family at 160 New York Avenue, North Babylon, New York where he has lived for 8 years. Since his arrest and suspension from the Police Department, he has been employed by Queens Nassau Lighting Company, Inc., a corporation engaged in the business of electrical supplies. He is the

sales manager and is essential to the conduct of that business. He is a disabled, pensioned veteran with no previous blemish on his record and is active in various communal activities. Since his arrest in December, 1969, he has always been available when required to answer any pending Court proceedings, and will continue to be available should the Court stay the execution of the judgment of conviction pending the hearing and determination of this matter.

WHEREFORE the petitioner prays this Court to issue its writ of habeas corpus addressed to the Honorable George Roberts, Acting Justice of the Supreme Court, New York County presiding in Part 30 of said Court at 100 Centre Street in the City, County and State of New York and to the Commissioner of Corrections of the State of New York, 270 Broadway, City County and State of New York; and to the Honorable Louis J. Lefkowitz, Attorney General of the State of New York, 2 World Trade Center, City, County and State of New York ordering and directing them and each of them to have the body of the petitioner forthwith before the Court at that time that the petitioner be discharged from further custody. He further prays that all proceedings in the Supreme Court of the State of New York, County of New York be stayed pending the hearing and

PETITION FOR A WRIT OF HABEAS CORPUS

determination of this petition, and further asks that the Court prescribe the time of notice to direct to whom the notice of this application shall be given. He further asks this Court to admit him to bail pending the hearing on this petition and that the Court fix the amount of such bail that may be required of your petitioner and that on furnishing bail to the Clerk of this Court that he be released until final determination of this cause.

For the purpose of informing the Court he states that Jonathan Lovett, Esq., is the Assistant District Attorney of the County of New York in charge of this prosecution and his address is at 155 Leonard Street, New York, New York and that the petitioner as already stated, will be required to surrender at 4:30 p.m. on January 20, 1975 in Part 30 of the Supreme Court, New York County before Mr. Justice George Roberts.

No previous application for the relief sought herein has been made to any Court other than as set forth hereinabove.

Victor J. Herwitz
Attorney for Petitioner

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

STANLEY ROTHSCHILD,

Plaintiff,

-against-

STATE OF NEW YORK,
COMMISSIONER OF CORRECTIONAL SERVICES,
HONORABLE GEORGE ROBERTS,
Acting Justice of the Supreme Court of the State of New York,
New York County,

Defendants.

- -X

MOTION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL PURSUANT TO 28 USC 2253 and RULE 22 (b) U.S. COURT OF APPEALS SECOND CIRCUIT

75 Civ. 270 (HFW)

The above-named petitioner-plaintiff STANLEY ROTHSCHILD, by his attorney VICTOR J. HERWITZ, hereby makes this application to United States District Court, District Judge HENRY F. WERKER, pursuant to 28 USC 2253 and Rule 22(b) of the United States Court of Appeals for the Second Circuit for a certificate of probable cause of appeal to said Second Circuit Court of Appeals. This motion is made on the following papers:

1. The petition of STANLEY ROTHSCHILD for a writ of habeas corpus, dated January 20, 1975, together with the Exhibits annexed thereto.

2. A copy of the record and briefs of the parties submitted to and filed with the Court of Appeals of the State of

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

New York in the instant proceeding.

3. The opinion of the New York State Court of Appeals dated November 27, 1974.

4. The memorandum decision and order of United States District Court Judge HENRY F. WERKER, filed on February 10, 1975 in the Office of the Clerk of the United States District Court for the Southern District of New York.

5. The affidavit of VICTOR J. HERWITZ duly verified March 7, 1975 submitted in support of this application.

6. The argument of counsel at the hearing held befor Judge WERKER on January 23, 1975.

Respectfully submitted,

Victor J. Herwitz
Attorney for petitioner-plaintiff
Stanley Rothschild
22 East 40 Street
New York, New York 10016

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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STANLEY ROTHSCHILD,

Plaintiff,

-against-

75 Civ. 270 (HFW)

STATE OF NEW YORK, COMMISSIONER OF CORRECTIONAL SERVICES, HONORABLE GEORGE ROBERTS, ACTING JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK,

AFFIDAVIT IN SUPPORT OF APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

Defendants.

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

VICTOR J. HERWITZ, being duly sworn, deposes and says:

1. I am the attorney for STANLEY ROTHSCHILD, the plaintiff petitioner in this habeas corpus proceeding and I make this affidavit in support of his application for a certificate of probable cause pursuant to 28 U.S.C. Sec. 2253.

2. On February 10th, 1975 this Court (Werker, D.J.), in a memorandum decision, ordered that ROTHSCHILD'S application for a writ of habeas corpus from a New York State Court conviction be denied. As appears in Judge Werker's memorandum decision, (copy of which is annexed hereto, made a part hereof, marked "Exhibit 1"), that denial was based on the Court's finding that, although errors of constitutional proportions had been committed in the course of the trial which resulted in the conviction, the "errors ...cannot outweigh the record's overwhelming evidence against petitioner ...(and) mandates the conclusion that the

errors cited were harmless beyond a reasonable doubt." (opinion pages 9,10).

3. With all respect to the Court's above stated conclusion, it is submitted that for the reasons stated below, the evidence of ROTHSCHILD'S guilt was not "overwhelming" and the constitutional errors committed by the Trial Court in the course of the trial substantially prejudiced ROTHSCHILD and it cannot be stated with any degree of assurance that those errors did not result in his conviction.

4. ROTHSCHILD was convicted of grand larceny in the first degree and attempted grand larceny, both by extortion. With respect to the grand larceny in the first degree count, the only direct evidence as to ROTHSCHILD'S alleged demand for money, receipt of money, or accompanying threats, came from the complaining witness, WILLIAM MATHIS, SR. (A166-179)*. MATHIS was a man with an extensive prior criminal record. (A)161-162;(A) 308;311). At the time of the alleged extortion,however, MATHIS claimed that he was a legitimate business man (A 162). Nevertheless, he was unable to produce any bank record or any other documentary proof to support his testimony that he had given $6,000.00 to ROTHSCHILD.

5. MATHIS'S testimony was supported to a limited extent by the testimony of GERALDINE WILLIAMS, the common law

*(Numerals in parenthesis preceded by the letter "A", refer to page numbers in the State Court Record on Appeal).

wife of MATHIS'S son. She testified that ROTHSCHILD and colleagues of his, including one NAPOLITANO, had come to her apartment on the day in question, had threatened her, and required her to call her "father-in-law" and have him come to the apartment. (A 390-397). She did not, however, hear ROTHSCHILD or any of the other men demand money from MATHIS, nor did she witness the alleged payment of money by MATHIS to ROTHSCHILD (A 398-399).

6. NAPOLITANO, who was called as a witness for the People, swore that MATHIS, SR. had not been summoned to come to the WILLIAMS apartment at the time of the alleged extortion. (A 152-153). He emphatically denied that ROTHSCHILD or any of his colleagues had asked for or received any money from MATHIS. (A 148;A 230). NAPOLITANO'S previous record in the Department was unblemished and included fifteen meritorious citations.(A 148-149). ROTHSCHILD, who testified in his own defense, also denied that MATHIS had been in the WILLIAMS apartment on the day in question and he further denied having asked for or received any money from MATHIS (A 437).

7. On the basis of the foregoing brief statement of the evidence relative to the extortion count, it certainly cannot be said that the evidence of the defendant's guilt on that count was "overwhelming". It is assumed by deponent that Judge Werker, like the New York State Court of Appeals, considered the evidence overwhelming because of the subsequent purported recorded conversation between ROTHSCHILD and MATHIS SR. on December 11th. In

Judge Werker's decision he quoted the Court of Appeals footnote statement regarding that recorded conversation as follows:(Opinion page 4)

> "The recorded conversation referred to the October 21 extortion and defendant expressed no surprise when Mathis complained that "6,000 in two months . . . two months ago, and now twelve . . . where the hell am I going to get that kind of money.". . . [D]efendant inquired "(h)ow much will you pay me?" and after Mathis replied $300 now and$500 per week, defendant acceded. Defendant does not dispute the accuracy of the recording. He complains only that it was of poor quality and that his statements were taken out of context."

8. With respect to the above quotation,the actual facts as shown in the record demonstrated that the Court of Appeals and apparently Judge Werker were misled into accepting at face value statements made by the District Attorney in his brief in the Court of Appeals. At Page 15 in that brief, the District Attorney said this :

> "People's Exhibit 11, the tape recording of the conversation between Mathis and Rothschild on December 11th, confirms vital aspects of Mathis's testimony.* During the course of their conversation, Mathis referred to the completed, $6,000 extortion of October 21st, and Rothschild, apparently aware of that event, expressed no surprise when Mathis complained:
>
> "6,000 dollars in two months * * * two months ago, and now twelve.* * *Where the heil am I going to get that kind of money." See transcript, p. 3, A672 (Exhibit 14)."

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

*Sergeants Bell and Maduro, who subsequently listened to the tape recording and typed a transcript of the conversation, noting inaudible portions, testified that the recording fairly and accurately represented the conversation they had heard (Maduro: 427, 430-1; Bell: 456-7). The transcript accurately revealed every word that they heard on the recording (Maduro:432). Detective Bishop explained that the tape quality was poor but "you can still distinguish what was being said. You can still get the meat out of the conversation"(413-14).

9. The transcript of the recording which was not marked in evidence but merely for identification (A 355) and whose accuracy, as shall be shown below, was consistently challenged by the defendant, reads nevertheless as follows: (Appendix pp. 3-4):

"Mathis: 6,000 in two months (indist) two months ago, and now twelve (indist). Where the hell am I going to get that kind of money. This automaticly shows how dirty some of these people are out here (indist) for if I had been doing anything wrong you would definitely have to stop and if I was involved, I would stop just for the sake of saying the hell with it, because, I am not going to be out here hustling (indist). I told you that I was going to go ahead on, and get this money together. The only thing is I couldn't get it together in the type of way that I wanted to get it. But - like I said I (indist) make a deal, work out something (indist) later on (indist) I am not going to hold up on somebody. Once I make a decision, I live with it.

Rothchild: Gee, I don't like (indist) personally (indist) but, I do anything you say. It's bad news coming back here.

Mathis: I know it bad news.

Rothchild: (indist).

Mathis: Damn right.

Rothchild: (indist) Just by me walking in here (indist)."

10. It will be seen from the foregoing, that assuming the accuracy of the transcript, immediately after MATHIS said "6,000 in two months", there is something on the recording which the transcribers could not hear. It will further be seen that when MATHIS said "two months ago, and now twelve", there is also something on the recording which the transcribers could not hear. There is nothing to indicate that what the transcribers could not hear was ROTHSCHILD'S voice making some kind of response to those statements. How can one conclude as the Court of Appeals did and apparently Judge Werker did, that ROTHSCHILD "expressed no surprise when MATHIS allegedly said "6,000 in two months...two months ago" when what is on the recording is indistinguishable. Furthermore, there is nothing in the transcript to indicate that ROTHSCHILD even heard MATHIS'S statement about "6,000 in two months". There is nothing in the recording to indicate that MATHIS, when he made that statement, was facing ROTHSCHILD, or that intent on making a record, he had not turned away from him in order to perfect that record without fear of contradiction. In light of the foregoing, it is respectfully

submitted that even assuming the accuracy of the transcript of the purported recording, it in no way confirmed as the District Attorney contended "vital aspects of Mathis's testimony".

11. In the opinion of the Court of Appeals (quoted by Judge Werker in his opinion at page 4), it was stated that in the recorded conversation:

> "[Defendant inquired "(h)ow much will you pay me?" and after Mathis replied $300 now and $500 per week, defendant acceded".

In respect to the above quotion from the transcript, it is significant to note that Justice Baer, after listening to the recording for the second time, said that he did not hear the words "pay me". This is what Justice Baer said with regard to that line in the transcript: (A 20).

> "THE COURT: On page 7, I am asking you to check something that I am not certain of but I heard most of that page, but in the very line that Mr. Herwitz raised a question about where Rothchild says "How much will you pay me"? I must say that the last 2 words were quite indistinct. I heard clearly "how much will you ..." - I thought it said "five", and that's all. I didn't hear "pay me".
>
> And, please this is an important one, Mr. Gershmar and if it is not clear, please don't let us leave it in the transcript".

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

Thus it will be seen that the very significant words of the transcript "pay me" were not audible to the presiding Justice and it is therefore patently unfair to find that defendant's guilt is overwhelmingly established among other things by words in a purported recording which the presiding Justice could not hear.

12. Nor is there anything in the transcript or in the recording to support the Court of Appeals statement that after defendant allegedly inquired of MATHIS "how much will you pay me, that MATHIS replied "$300 now and $500 per week and defendant acceded". There is no such statements in the transcript to support that finding. At page 8 of the transcript MATHIS is quoted as saying "...you take this trey, I will try to get you two more tomorrow and make it five - you take 500 a week". The transcript then has "ROTHSCHILD (indist)". In view of the fact that ROTHSCHILD'S alleged comment to MATHIS'S offer as reported in the transcript was so indistinct that it could not be heard by the transcribers, it was certainly unfair for the Court of Appeals to conclude that ROTHSCHILD had "acceded".

13. The statement in the Court of Appeals decision quoted by Judge Werker that "defendant does not dispute the accuracy of the recording, he only complains that it was of

poor quality and that his statements were taken out of context" is also not supported by the record. At the time that the recording was offered in evidence, counsel for ROTHSCHILD objected to it and stated (A 358) in support of that objection as follows:

> "MR. HERWITZ: I object if your Honor pleases, to the introduction of the recording on the grounds that no proper foundation for it had been laid. That there is no sufficient audibility of anything that is material to the issues here, and on the further grounds it has not been established that the machine that took, allegedly took this recording of this conversation was capable of actually recording the conversation, and that as a result the best you have is a false impression of what the conversation was. That there are very very large segments of it that are uncomprehensible. There are segments that are comprehensible, but by in large most of them are incomprehensible. If your Honor pleases those are my objections".

With respect to the accuracy of the purported transcript of the purported recording, defendant's counsel objected to its being shown to the jury for the following reasons among others (A 360)

> "Where transcripts are shown to a jury, I respectfully submit it should be only where there can be no question about the clarity of the recording and the accuracy of the transcript. Where there is any serious question as to the accuracy of the transcript and the clarity of the recording, I do most seriously claim that this transcript is not accurate. In my eyes, your Honor, I respectfully submit that this transcript should not be shown".

14. In his trial testimony ROTHSCHILD was not asked about the accuracy of the transcript. He was asked the following

questions and made the following answers with respect to the accuracy of the recording (A 457).

"Q. And you have heard a recording, have you not?

A. Yes, I have.

Q. Of a conversation?

A. Yes.

Q. That occurred between you and Mathis?

A. Yes.

Q. From what you could hear on the recording, is that a fair or substantially accurate recording of the conversation?

A. No, it is not.

Q. In what respect is it not?

A. The conversation is completely out of context.

Q. In what way?

A. Well, like I said, I don't recall the complete conversation, but there is complete parts of the conversation where there were questions and answers by both me and Mr. Mathis that is completely missing from the tape. By this being missing, you can't actually comprehend what happened. What was being said, you have to think about what somebody was saying."

15. In his brief in the Court of Appeals, counsel for the defendant claimed under Point III (page 50), that "it was error for the Trial Judge to permit the jury to use as an aid the purported transcript of the recorded conversation between

the defendant and MATHIS". In support of that point, counsel said this:

> "Before the trial began, an audibility hearing was conducted with respect to the recording of the conversation between the defendant and Mathis on December 11th. After listening to the recording, the Trial Judge put on the record numerous instances where he was unable to hear what was on the alleged transcript, (People's Exh. 14 for ident.) The number of such instances are listed at pages A 16-A 24. Nevertheless, over defendant's objection, the Court permitted the jury to use the transcript as an aid. It is submitted that this was error highly prejudicial to the defense."

16. Throughout the proceedings in the State Court, defendant and his counsel denied the audibility of the purported recording of the conversation between ROTHSCHILD and MATHIS and the accuracy of the purported transcript of that recording. In his Appellate Division brief, defendant's counsel argued under Point III thereof that "The recording, People's Exhibit II, was so inaudible that it was error for the Court to admit it into evidence; it was also error for the Court to permit the jury to use an inaccurate, purported transcript of the recording as an aid in understanding the recording." Annexed hereto, made a part hereof, marked "Exhibit 2", is a copy of pages 29-32 of ROTHSCHILD's brief in the Appellate Division, in which his counsel gave his reason in support of the

point heading quoted above. Among the facts stated therein, it will be noted, was one of considerable significance; Supreme Court Justice Carney ruled in a companion case (People v. Alongi), that the very same recording here involved was so inaudible as to be inadmissible at a matter of law.

17. The Court of Appeals did not hear the recording. Judge Werker did not hear the recording. Without hearing it, one cannot know how garbled, indistinct and patently incomplete and inaccurate it was. If Judge Werker concluded that the evidence supporting the extortion count was overwhelming on the basis of the presumed accuracy and audibility of the recording (Peoples Exhibit 11) then clearly the Court's reliance was misplaced.

18. In determining whether or not the proof of ROTHCHILD'S guilt under the extortion count was "overwhelming", it is certainly significant to note that the Court's charge to the jury was concluded at 11:45 A.M. At 6:05 P.M. the jury reported to the Court that they had agreed on the second count, the attempted grand larceny count, but had not reached a verdict on the first count, the grand larceny extortion count. With respect to the latter count, the jury did not return with their verdict until 10:20 P.M. It will thus be seen that many hours passed before the jury arrived at their guilty verdict with respect to the first count, and that it did so only after it had found the defendant guilty under the second attempted grand larceny count.

19. On the basis of the facts set forth above, it must be clear that in the minds of the members of the jury, ROTHCHILD's guilt or innocence under the first count of the indictment was an extremely close question, and resolution of that question depended upon the credibility of the witnesses and particularly of ROTHSCHILD himself. It is submitted that if the jury had not found ROTHSCHILD guilty on the second count of the indictment, they would not have found him guilty on the first count of the inditement.

20. With respect to the attempted grand larceny count, it is respectfully submitted that far from being overwhelming, the evidence offered by the prosecution was incredible and entirely unworthy of belief. It was the theory of the prosecution that ROTHSCHILD had demanded the $12,000.00 and threatened that if he was not paid that amount, he would execute the search warrant then outstanding for the complainant's son, WILLIAM MATHIS, JR. (A414-420). At the time that alleged threat was made, the search warrant in question was about to expire, it had just one day to run, the whereabouts of MATHIS, JR. was not known to ROTHSCHILD and MATHIS, SR. and MATHIS, JR. both knew that the police sought to execute that search warrant. Obviously, that warrant did not pose such a threat to MATHIS, SR. or to his son that any policeman bent on extortion would believe that the payment of any substantial amount of money could be extorted by such a weak threat.

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21. If ROTHSCHILD denied having discussed with MATHIS, SR. the payment of money by the latter, then the recording would have provided overwhelming proof that he had done so and of his guilt, but ROTHSCHILD did not deny his discussions of money with MATHIS. He claimed as his sole defense that not knowing that MATHIS was trying to entrap him, ROTHSCHILD was trying to entrap MATHIS. That was his defense and in order to disprove that claim, the District Attorney asked the questions which Judge Werker has held violated ROTHSCHILD's Fifth Amendment Rights.

22. Whether Judge Werker or the State Appellate Courts which reviewed this conviction believed ROTHSCHILD's defense to the attempted grand larceny by extortion count, he was certainly entitled to have it passed upon by the jury, fairly. This he was not permitted to do.

23. Under the circumstances set forth above, it is respectfully submitted that questions put to ROTHSCHILD as to his post-arrest silence would more than affect his credibility generally. They constituted affirmative proof in support of one of the essential elements of the prosecution's case; to wit, ROTHSCHILD's intent.

24. For the reasons set forth above, your deponent urges upon Judge Werker that he grant this application for a certificate of probable cause and thus grant leave to have this conviction reviewed by the Court of Appeals of the Circuit.

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25. No previous application has been made for the relieft sought herein.

VICTOR J. HERWITZ
Attorney for Petitioner-Plaintiff
Stanley Rothschild,
Office & P.O. Address
22 East 40 Street
New York, N.Y. 10016

Sworn to before me this
7th day of March, 1975.

HERMAN LIEBLICH
Notary Public, State of New York
No. 41-2359350
Qualified in Queens County
Commission Expires March 30, 1975

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29.

POINT III

THE RECORDING, PEOPLE'S EXHIBIT 11, WAS SO INAUDIBLE THAT IT WAS ERROR FOR THE COURT TO ADMIT IT INTO EVIDENCE; IT WAS ALSO ERROR FOR THE COURT TO PERMIT THE JURY TO USE AN INACCURATE PURPORTED TRANSCRIPT OF THE RECORDING AS AN AID IN UNDERSTANDING THE RECORDING

Without a doubt, the People's case on both counts relied heavily upon People's Exhibit 11, a recording of an alleged conversation between defendant and the complainant, Mathis. Before the trial began, there was a hearing to determine whether the recording was audible. After hearing the recording the first time, this is what the Court said about it: (9-10)

> "Well, I can't say it is too distinct - beginning and the end I got - we will have to play that over again, with Mr. Gershman pointing out the pages.
>
> "I, even with the transcript, I couldn't follow it except from beginning and a little toward the middle and the very end, but other than that it is pretty hard to gather anything out of that."

The Court also said that the jury "certainly aren't going to be able to use this as evidence." (12)

EXHIBIT "2"

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30.

After a subsequent hearing of the recording, the Court put on the record what he could and could not hear on the recording as compared with the purported transcript of it. (27-37) (People's Exh.14 for identification) It appears from Justice Baer's statement that there were extensive portions of the transcript which he could not hear on the recording. Nevertheless, the Court overruled defendant's objections to the use of the recording in evidence and the use of the transcript as an aid to the Jury in following the recording (434-436).

That a serious question is presented as to the admissibility of the recording may be shown by the fact that on the trial of Vito Alongi, the co-defendant named in Indictment #495/70, Mr. Justice Carney ruled that it was so inaudible as to be inadmissible.

In People v. Sacchitella, 31 A D 2d 180, 181 this Court said that."...The law is clear that a recording must be rejected if it is so inaudible and indistinct that a jury must speculate as to the contents thereof. (Ann.58 ALR 2d 1028; People v. Velella, 28 Misc. 2d 579; State v. Driver, 38 N.J. 255; Hammers v. State, 337 P. 2d 1097 [Okla.]; People v. Stephens, 117 Cal.App.2d 653.)

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31.

In view of the serious questions raised as to the audibility of the recording and the accuracy of the transcript, this Court is respectfully requested to itself listen to the recording and compare it with the transcript to determine the accuracy, or inaccuracy, of the latter. If it finds, as Justice Baer did, that the transcript is not substantially accurate, that it contains highly prejudicial matter which cannot be heard on the recording, then, defendant submits, it was error substantially affecting the rights of the defendant for the trial court to allow the Jury to use the transcript as an "aid".

The use of the transcript as an "aid" is, at best, a dangerous practice. It has been allowed by our courts to be so used for the limited purpose of aiding the jury in following the recording but if the trial court determines, as he did in the case at bar, that the transcript was substantially inaccurate and contained highly prejudicial matter which he could not hear on the recording, then clearly there is no justification for the use of the transcript. There is too great a likelihood that the jury will assume that what is on the trans-

cript was on the recording. The danger of this is so obvious, despite contrary instructions by the Court, that it deprives a defendant of the fair trial, in accordance with due process of law, to which he is constitutionally entitled.

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Attorney for